LEGAL SCHOLARSHIP, REALISM, AND THE SEARCH FOR MINIMUM WORLD ORDER

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Kenneth S. Carlston, *Law and Organization in World Society*, Urbana, University of Illinois Press, 1962, 356 pp. $6.50.
C. Wilfred Jenks, *Law, Freedom and Welfare*, Dobbs Ferry, N.Y., Oceana Publications, Inc., 1963, 162 pp. $6.00.

IN recent years the parlous state of public order in the world community has become an irresistible goad to creative energy by legal scholars. Unfortunately, the significance of many potentially valuable contributions to an improved order has been diluted by the tendency of writers to approach their thesis from the limited perspective of their own discipline as a more or less closed system, or to develop their views while suffering from what Harold Lasswell has referred to as the "syndrome of parochialism."[1] In an era characterized by intensive professional specialization and mounting chauvinism, the international lawyer who can surmount the parochialism of his own profession and his own cultural predispositions is a rarity indeed; the paragon who can do so consistently is even rarer.

Yet the intricacies of disarray in the decentralized, horizontal system of world public order[2] will obviously not yield in any significant degree to the blandishments of positivistic rule manipulators—no matter how broadly international their perspectives may be—nor to recommendations constructed from the vantage point of the policy and value preferences of only a fraction of the participants in the global community. Proposals for bringing the world's legal order beyond its current state of near anarchy tend to be merely precatory unless they are firmly grounded in the realities of international life. Such realities include all the relevant features of the dynamic and complex decision-

[1] Myres S. McDougal and Florentino P. Feliciano, *Law and Minimum World Public Order* (New Haven 1961), xxi.

[2] For descriptions of the structure of legal organization in the world community, see Morton A. Kaplan and Nicholas deB. Katzenbach, *The Political Foundations of International Law* (New York 1961), 19-29; Myres S. McDougal and Harold D. Lasswell, "The Identification and Appraisal of Diverse Systems of Public Order," *American Journal of International Law*, LIII (January 1959), 1; and Richard A. Falk, "International Jurisdiction: Horizontal and Vertical Conceptions of Legal Order," *Temple Law Quarterly*, XXXII (Spring 1959), 295.

making processes in which such proposals are to be implemented, as well as the external and internal conditioning factors which influence decision-makers and other participants in those processes.[3]

The two works under consideration in this article differ markedly in the extent to which they take account of these realities and in their methodology as well. C. Wilfred Jenks, in *Law, Freedom and Welfare*, has collected a series of seven of his lectures and papers which proceed further along the lines of his earlier work, *The Common Law of Mankind*.[4] Essentially, Jenks's approach is that of the experienced international lawyer working within the framework of legal positivism[5] to increase respect for rules of international law and thereby to encourage states which are members of the international community to submit their conduct to the application of those rules. He directs his scholarship to international lawyers and seeks to enlist their aid in promoting the growth of the scope of international law into areas of human concern such as freedom and welfare, which hitherto have been left largely in the domain of intrastate or regional competence. His aim is to encourage optimism (and "faith and creative vision") for this task by reporting the formidable advancements made by international and regional organizations in prescribing new norms and recommending new standards in these areas, and to foster a climate of urgency by calling attention to the grand scale of the risks thrust upon all states by innovations of modern technology and to the desperate need for mastery of these newly perceived "laws of nature."

Jenks attempts to create new bases for cooperative effort in the prescription and ultimate subjection of all states to new norms of international conduct by locating an acceptable common morality—"the product of an enlightened self-interest"—by proving the existence of a new basis of legal obligation—"the will of the world community"—by finding that "interdependence of states" has replaced independence as a basic concept of international law, and by calling for a universality

[3] Cf. McDougal and Lasswell, "Identification and Appraisal."

[4] London 1958.

[5] Critics of *The Common Law of Mankind* have referred to Jenks as a legal positivist who has regressed. They assert that he not only fails to consider law as operating within the context of its "social environment," but also has lagged behind those "progressive" positivists who study law as it is applied to concrete cases. See Richard A. Falk and Saul H. Mendlovitz, "Some Criticisms of C. Wilfred Jenks' Approach to International Law," *Rutgers Law Review*, XIV (Fall 1959), 1. This writer finds that the perceptive criticism of Jenks's approach contained in the Rutgers article is equally applicable to *Law, Freedom and Welfare*.

of perspective which will encompass all the legal systems of the world in searching out "general principles of law."

As an appeal to lawyers and jurists of the Austinian school and others of a cynical disposition to discard their debilitating view of international law as "not-law," *Law, Freedom and Welfare* is unexceptionable, and indeed praiseworthy. As an antidote to pejorism in international relations it represents "the power of positive thinking" in its highest form. And many internationalists will join Jenks in his attack on parochialism. But insofar as this work purports to be "a positive programme of bold but practical action" (p. ix) to broaden the scope and applicability of the rule of law in international affairs,[6] it tends to overlook a host of factors the consideration of which is essential to its success. Jenks apparently eschews the policy-science approach to scholarship urged upon him by some of his earlier critics[7] which would have required him to consider in a systematic way all of the relevant configurations of the processes of interaction with which he dealt before arriving at his formulations. This is not to suggest that the carefully reasoned recommendations of a distinguished legal scholar of international reputation are not entitled to earnest consideration, nor that we are entitled to presume that Jenks, a lawyer with more than thirty-three years of acquaintance with international organizations, did not rely heavily upon his vast experience with international decision-making and his understanding of global conditions, including the predispositions of the decision-makers themselves, in developing his proposals. Indeed, it is the disordered state of these conditions which provided the impetus for his writing. Rather, it is to suggest that his unwillingness to consider systematically the ways in which all of the relevant features of the world community bear upon the process of decision has seriously limited the feasibility of his recommendations. This is especially true with respect to situations of high value intensity,[8] the very situations which Jenks believes must be subjected to authoritative control by international law.[9]

[6] Jenks is somewhat disdainful of legal scholarship in international law which does not motivate action. (*Ibid.*, 11.)

[7] See, e.g., Florentino P. Feliciano, book review, *Yale Law Journal*, LXVIII (April 1959); and Falk and Mendlovitz, "Some Criticisms."

[8] By "high value intensity" I simply refer to situations in which the participants tend jealously to guard their interests, their values, and their freedom of action. Arms control, disarmament, and the status of West Berlin are classic examples. However, any situation in which important resources or institutions are sought to be subjected to international control or agreement can become of high value intensity once a relationship to cold war politics becomes publicized.

[9] E.g., "The primary function of international law in the contemporary world is to outlaw recourse to armed force" (p. 53).

For example, his proposal for the development of a universally applicable body of rules through comparative study and synthesis of diverse legal systems (chap. VII) fails to take into adequate account the complementarity of legal doctrines which provides a choice to decision-makers to select among competing rules based on value preferences and policy.[10] The supposition that such universality will promote submission to international adjudication ignores the historical datum that states wedded to the civilization and culture out of which modern international law has sprung have at times refused to commit themselves unconditionally to the jurisdiction of the International Court of Justice.[11] It also pays insufficient attention to the major reason for such refusals: deeply rooted adherence to concepts of sovereignty and independence which provide protection, or which national decision-makers *believe* provide protection, from external control and manipulation of highly esteemed interests and values of the domestic society. In short, the proposal for universality, in which Jenks calls for a massive research effort and a heavy commitment of resources and scholarship to the study of comparative law, seriously overemphasizes the value of rules over the rule of values.[12]

Jenks's view that interdependence has replaced dependence as a basic concept, that there is a common morality upon which international law can be based, and that the collective will of the world community is the emerging basis of obligation in international law, while ennobling, are unfortunately subject to similar criticism. It is curious that in seeking support for the last proposition Jenks turns to psychol-

[10] The complementarity of legal rules and their "normative ambiguity" are discussed in McDougal and Feliciano, *Law and Minimum World Public Order.*

[11] The most notorious example is the Connally reservation. Declaration by the President of the United States of America, August 14, 1946, Respecting Recognition by the United States of America of the Compulsory Jurisdiction of the International Court of Justice, para. 2(b), 61 Stat. 1218, T.I.A.S. No. 1598.

[12] The criticism is not that Jenks fails to recognize the effect of national interests of a non-legal nature on the acceptance of international law, for he states: "National attitudes toward questions of public international law have frequently been, and continue to be, influenced by national conceptions of public policy which have generally had more of the flavour of interests than of that of legal conceptions" (p. 142). Rather, it concerns his failure, in recommending research toward a synthesis of legal traditions, to give sufficient weight to this factor.

Professor Carlston, on the other hand, is fully cognizant of the impact of national policies and values. He states, as essential propositions: "The orientation of a state official toward a rule of international law as a factor in his decision making will be to take action at the outer limits of rationality in the application of the rule when it conflicts with national policy and values" (p. 165). And, "Decision making in the international system is predominantly made by those in authoritative roles who view situations of an international character in the light of their respective national cultures, value systems, and goals" (p. 141).

ogy and the "sociology of politics" (p. 94),[13] whereas he scrupulously avoids interdisciplinary consultation in placing his own recommendations for action within the framework of global processes of decision. What is being criticized here, of course, is not his classical erudition, but rather his failure to come to grips with the discouraging but nonetheless vital fact that a multitude of factors—political, economic, sociological, ideological, and psychological—coupled with serious divergences of value goals and premises and further exacerbated by distorted images of world affairs on the part of the power elites of nation-states, account for the continued reluctance to submit major issues of peace, freedom, and welfare to authoritative and effective decision-making on a global scale. Thus, his emphasis on the importance of formulating moral and philosophical bases for new prescriptions is largely misplaced, reflecting a dangerously oversimplified perception of why international adjudication and legislation have been ineffective.[14]

As compared with Jenks, Kenneth Carlston, in *Law and Organization in World Society*, exhibits far greater willingness to contend with the realities of international life. Two major differences are evident. First, Carlston displays the skepticism of the American legal realist regarding the role which legal rules play in international decision-making, recognizing that policy with respect to value objectives is ordinarily the decisive factor (p. x).[15] Like Jenks, he believes that perspectives of universality are important to the advancement of law and organization in the world community, but his conception of universality emphasizes the need to identify and then develop practices and institutions designed to maximize *universally shared values*, not just to synthesize and discover universally shared legal norms. Secondly, his research and his theory rely heavily upon the collected wisdom

[13] Specifically, he refers to Walter Lippmann, *The Phantom Public* (New York 1925).

[14] The relative ineffectiveness of finding a moral basis of obligation as a means of explaining conformity or non-conformity to international law has been asserted by Professors McDougal and Feliciano: "Amorphous, transcendental notions of an 'inherent binding force' and 'basis of obligation' may be useful in the exhortation of the conscience of peoples. Propositions cast in the solemn terms of 'binding obligation' probably do in measure commit and engage peoples' consciences. The suggestion we make, however, is that the clarification of fundamental policy and the explicit relating of specific alternatives in decision to the basic demands, expectations, and identifications of peoples constitute, again because of the postulate of maximization, much the more effective way of organizing, channeling, and harnessing their perspectives to the implementation of minimum order and as well of international law generally" (p. 278).

[15] Professor Carlston has had better than thirty years of experience in the practice and teaching of international law.

of disciplines other than law, frequently drawing support from studies of political scientists, economists, sociologists, and others.

For these reasons alone, one is entitled to expect a less romantic perception of the province and function of law in global relations from Carlston than from Jenks. This expectation is heightened by the fact, made explicit in Carlston's foreword (p. vii), that he is adopting a scientific approach to his inquiry, wherein a specific problem, a microcosm of global conflict, will serve first as a seeding ground for the author's theory of law and organization in world society, and then as a laboratory for testing some of the propositions which compose his theory.

As his core problem Carlston selected the nationalization of concession agreements. The features of this problem were then explored, not solely for the purpose of analyzing the legal doctrine which regulates the problem, but in order to determine "its factual aspects and ramifications, the values and perceptions of the actors involved, the nature of its social, economic, and political setting, and the function and ends which the relevant rules of law should serve"(p. 8).

Unfortunately, the failure to adopt a more systematic approach to the factual features of the problem detracts somewhat from the fulfillment of Carlston's objective.[16] Nonetheless, he draws a vivid picture of the important role of the concession agreement in serving the needs of the economies of both the industrially developed and the developing states and of the international, as well as the national, role which such agreements play. His examination of the economic implications of trade relationships between the have and have-not states and international commodity problems underlines not only the factual interdependence of states but the phenomenon that interdependence, when it works unfavorably toward the developing nations, as it has since the Second World War, is a cause of frustration which often results in resort to nationalization and unrealistic demands for autarky. His perception of the fact that interstate symbiosis is not necessarily a basis for "international solidarity or integration," but can become so only in conjunction with the simultaneous realization of valued goals (p. 99),

[16] A more systematic methodology, which would have ensured that no relevant stone was left unturned, has been developed by Professors McDougal and Lasswell of the Yale Law School and applied, with variations, by a number of contemporary legal scholars. Briefly, it requires examination of all participants, their value objectives, the situations in which they are functioning, their base values, their strategies, the specific outcomes of the process, and the longer-term effects on the participants, their values, and the various communities which are affected. See Myres S. McDougal, "Some Basic Theoretical Concepts About International Law: A Policy-Oriented Framework of Inquiry," *Journal of Conflict Resolution*, IV (September 1960), 337.

points out the fallacy in Jenks's approach to interdependence as a basic concept of international law replacing that of dependence. For, in the current state of international relations, it appears to be the chafing of the developing nations at the ill effects of their *factual* dependence upon the industrialized nations which has contributed to their assertions of rights of *legal* independence and sovereignty.

Turning from economics to examination of the societal structures of states engaged in nationalization, Carlston hypothesizes, and then seeks to prove, that such structures exhibit consistent patterns. He refers to such states as "veneer states," which fail to exhibit in all their cultural patterns the characteristics of more highly developed societies, but contain a large population segment that does not share widely in the realization of important values monopolized by the elite (chap. IV). The lesson which Carlston draws from this part of the study, and indeed the major thesis of his book, is that submission to the authority of law and the creation of a stable world organization are predicated upon the requirement that "law . . . should secure the conditions necessary for effective interaction in the system with a view to realizing commonly shared values by the actors, as well as adherence to ideal and valued norms of behavior" (p. 285).

Having examined the factual and historical patterns of nationalization, its causes, and its effects on international economic relations, Carlston then proceeds (after first expounding upon the detailed propositions which compose his theory of law and organization) to an examination of the juridical aspects of nationalization. The technique adopted is to state and examine the technical legal doctrine as it has been applied and manipulated by various decision-making bodies and then to find a norm. That norm's validity is tested by determining the extent to which it affects the realization of values shared by the actors who are to submit themselves to such norms and, in addition, the extent to which it meets other criteria of authoritativeness and effectiveness prescribed by the author in his theory of the province and function of law. He draws the conclusion that

> The international law norm governing a premature termination by a state of a concession agreement with an alien effected by an act of nationalization is that such action will entail international responsibility to the state of which the alien is a national to make prompt, adequate, and effective compensation.
>
> The above legal norm represents an ideal and valued norm of behavior by virtue of the fact that it embodies an acceptable composite or adjustment of the values involved in the situations to which the norm is applicable (pp. 283-84).

The sections of the author's work described above,[17] which deal explicitly with the various contextual and juridical features of nationalization of concession agreements, are deemed by Carlston to "illustrate the functional manner in which international legal questions should be investigated and stated" (p. ix).

The remainder of the book contains Carlston's elaborate theoretical formulation of the organizational structure of world society and the province and function of law within that society. Through a series of interdependent propositions and recommendations, drawing heavily on the work of behaviorists and social scientists as well as on his own earlier work,[18] he develops the thesis that successful world organization and the advancement of law and authority in international relations will depend greatly on the extent to which the organization and the law tend to maximize the realization of values shared by the participants at all cultural levels.

Depending, as it does, both on "empirical observation of human behavior" reported by the behavioral sciences and on a realistic view of jurisprudence, Carlston's value-oriented theory represents a substantial contribution to the understanding of the basic postulates of world public order. In many ways, Carlston has explicitly taken into account those vital factors the importance of which Jenks has only dimly perceived.[19]

It is the writer's view, however, that the merit of both works must ultimately be judged by the extent to which their conclusions and recommendations are the product of a realistic conception of *all* of the *relevant* features of the process of decision in the world society, and by the degree to which they convincingly orient the reader toward such reality. Traditional patterns of global interaction, which as a result of technological advance have become suicidal, cannot be altered if

[17] I.e., chaps. I-IV and propositions 9 and 10 of chap. VII.

[18] *Law and Structures of Social Action* (New York 1956).

[19] It would not do Jenks justice to suggest that his enthrallment with doctrine entirely excludes concern for underlying policy. Thus, the common law of mankind toward which he directs his effort is seen as a body of law which will advance the widely shared values of "human dignity, economic stability and growth, and the enlistment of technological change in the service of man" (p. 57). Furthermore, his concept of universality is unquestionably premised on the view that submission to supranational authority by emerging states is dependent upon the degree to which the norms applied by such authority incorporate values shared by such states. In his lecture, "The Challenge of Universality," for example, he grudgingly agreed with Professor McDougal that "the effective authority of any legal system depends in the long run upon the underlying common interests of the participants in the system" (p. 148). It is, however, his response to the foregoing that is disappointing; he calls merely for "a rigorous analysis of the *concepts* being compared" as "the first step towards any synthesis [of legal doctrine] of real value" (*ibid.*, italics added).

those guiding the action do not perceive the changes of conditions which require a changed response. This perception, in turn, must be at a high level of consciousness, and must be accompanied by an equally conscious recognition of the immediate and consequential effects of such changes, both actual and potential, on the value structure of the decision-maker himself and those for whose well-being he is responsible.

While the scope of this article does not permit a restatement of the work of the few distinguished legal scholar-scientists who are working feverishly against time to develop a creative role for law within the framework of the decentralized, partially polarized, world society, it may serve a useful purpose to rehearse here some of the global conditions which must be taken into account in developing that role.

(1) *The decentralized, non-judicial nature of decision-making at the transnational level.* Professor McDougal and others have pointed out that the global society is made up of diverse systems of order in which those who possess formal authority for making decisions that have the greatest impact on the entire society are usually officials of nation-states who also occupy the role of claimants on behalf of their own states.[20] When such officials believe that particular claims bear heavily on the prominent values of their own state—whether such belief is justified or not—the effect of legal doctrine as a factor in decision-making becomes minimal, while considerations of policy become decisive. As modern history clearly indicates, doctrine is often manipulated to justify policy ends,[21] and as Carlston suggests, in the long run the norms are adhered to only to the extent that they assist, directly or indirectly, in the realization or preservation of desired values.

But, and this is crucial, the fact that adherence to a particular norm (or to international law in general) will serve important value goals

[20] Cf. Myres S. McDougal and Associates, *Studies in World Public Order* (New Haven 1960), 276.

[21] This practice is evident in every phase of international legal relations from claims to exercise the right of self-defense, claims to exercise jurisdiction or competence over persons and resources, etc., up to claims relating to the basis of obligation and sources of international law. The writings of some of the Soviet legal theorists, for example, indicate the way in which the sources of international law can be manipulated to serve national policy. See, e.g., G. I. Tunkin, "Remarks on the Juridical Nature of Customary Norms of International Law," *California Law Review,* XLIX (August 1961), 419; and Tunkin, "Coexistence et Droit International," Hague Academy of International Law, *Recueil des Cours,* XCV (1958), 1. Incidentally, these articles also point up the almost insurmountable difficulty of getting the Soviet Union to accept, at a doctrinal level, Jenks's views that the will of the world community is replacing consent as a basis of obligation in international law or that interdependence is being substituted for independence as a basic international legal concept.

of the state will not result in its application by the official unless its relation to such goals is clearly perceived both by the official and by those participants in the process of decision who influence his action.

(2) *The effective, as distinguished from the formal, decision-makers within the various orders which compose the world community are widely dispersed.* Depending upon the nature of the society involved, the official in whom formal decision-making authority reposes is controlled and influenced to varying degrees by other participants—individuals and groups—both within and without his own society. In a pluralistic democratic society, the power and influence of such participants are widely dispersed. Nonetheless, their perspectives, myths, and valued institutions exercise considerable influence upon decision-making by those in formal authority.[22] In a totalitarian society the dispersion of authority is not as great, but the formal decision-maker is still compelled to consider not only the demands and expectations of other members of the power elite within his own state, but external pressures as well, if he is to retain his power position. It follows, therefore, that before those officials with the formal authority to make decisions of international import can be expected to adhere to universally accepted norms, those who influence them must also be convinced that adherence to such norms will maximize their own esteemed values, or at least not erode them.

(3) *The "reality gap."* The failure of the states which comprise the world community to submit themselves to the application of universal norms applied by independent judicial organs, or to move at anything more than snail's pace toward the creation of effective institutions designed to control the unilateral resort to force, may thus be ascribed to a pervasive blindness to the dangers and opportunities of the modern world. Whatever the causes—and the social psychologists, sociologists, and even psychiatrists have contributed a great deal to our understanding of such causes[23]—there is a gap in reality of cataclysmic proportions between the popular myth—appropriate for a bygone era—that a powerful nation-state is the ideal vehicle for value

[22] Official statements to the contrary notwithstanding, it is interesting to speculate whether President Johnson's decision of August 4, 1964, to retaliate against North Vietnamese bases for the torpedo boat attacks on United States destroyers would have been of the same intensity if his opponent in the next presidential election had not been urging greater bellicosity against the Communists. To what extent can decision-makers, acting under the pressures of a demand for immediate decision in a situation of high crisis, exclude such factors from their consideration?

[23] See, e.g., Roger Fisher, ed., *International Conflict and Behavioral Science: The Craigville Papers* (New York 1964), and Group for the Advancement of Psychiatry, *Psychiatric Aspects of Prevention of Nuclear War* (New York 1964).

protection (and creation) and the facts of the real world, which inexorably lead to the conclusion that organization and collective security present the only viable alternatives to total destruction and that transnational cooperation and mutual assistance are the best avenues to the solution of the world's economic and social problems.[24] Thus, as the danger of nuclear war between the United States and the USSR has diminished slightly because of the deterrent effect of the balance of terror, the centrifugal forces of irresponsible nationalism have been released in every corner of the globe and grow apace as if the danger of nuclear war had disappeared entirely. As part of this development, the growth of the interdependence of states—upon which Jenks based his new concept of interdependence—is retarded by demands for political and economic independence on behalf of practically all states. Even the paragon of regional economic cohesion, the European Common Market, displays growing signs of difficulty in both its political and economic aspects by virtue of reluctance to sacrifice national interests for the greater good of the entire region.[25]

In this context, what McDougal and Feliciano have suggested, in discussing sanctioning processes in the world community, becomes of wider relevance: "The most immediately relevant tasks of scholars and others concerned for the establishment of inclusive sanctioning processes appropriate to a world public order of freedom, security and abundance would thus appear to lie, not so much in the invention and evaluation of specific new legal techniques, as in the design and execution of appropriate alternatives in communication and collaboration for promoting the necessary changes in the perspectives of the effective decision-makers of the world."[26] International lawyers and legal scholars of the stature of Jenks and Carlston can bring skills and knowledge to these tasks far beyond mere talent for manipulating legal doctrine and theory.

In the first place, *they can reorient the perspectives of their audience.* They can utilize their understanding of the realities of conditions in the world community, coupled with their influence and skills in communication, to shatter the anachronistic illusions of the influential per-

[24] Cf. J. W. Fulbright, *Prospects for the West* (Cambridge, Mass., 1963).

[25] Cf. P. H. Spaak's comment in *European Community*, LXXII (June 1964), 7: "Even if we leave aside the problems of Great Britain's possible entry into the Common Market, and the increasingly grave and important question of our relation with the United States, we must accept the fact that at present there is little chance of further progress towards political unity in Europe. The difference in approach is so great and so profound that it is difficult to conceive of anyone proposing a compromise, let alone accepting one. This is just not the time."

[26] McDougal and Feliciano, *Law and Minimum World Public Order*, 375.

sons who make up their audience. This calls for a description of interaction in the world community which gives ample attention to such realities as the cold war, nuclear weaponry, major technological and scientific advances, the so-called "revolution of rising expectations," the "population explosion," the emergence of new states, the rise of socialism, demands for autarky, and especially the demands, expectations, and identifications of world decision-makers, and which attempts to test the impact of these realities upon the trends of world decision-making. While Carlston has considered many of these factors in developing his thesis, Jenks has apparently found contemplation of most of them too depressing to warrant an examination of their impact upon the effectiveness of his proposals.[27]

They can create an awareness of the impact of such realities upon the preservation, destruction, and production of values and, in turn, upon global decision-making processes. Although it is idle to suggest that the world's effective decision-makers are not aware, for example, of the destructive capacity of nuclear weapons, the extent to which there is full appreciation, at a high level of consciousness, of the degree to which nuclear arms immediately threaten all values is open to question. So it is, to an even greater extent, with the potentialities inherent in the other mentioned conditions. Scholars of international law, therefore, can contribute much through their writing and personal influence toward fuller comprehension of the relationship among conditions, values, and decisions. What is especially required is the fullest exposition of the possibilities for the maximization of all values through modern science and technology, leading to widespread recognition of the fact that the cold war and nationalism are primitive, inefficient, and dangerous instrumentalities for achieving value goals as compared with international organization, cooperation, and stable conditions of world order. Here of course, as in describing conditions, the legal scholar will have to rely heavily on the lore of other disciplines, but it is the characteristic of the great lawyer that

[27] Mr. Jenks recognizes that "on major questions of personal freedom, political organisation and economic policy, and above all on matters involving relative power and the strategy of self-protection and self-aggrandizement, there are cleavages of view which it would be idle to minimise" (p. 95). It seems to this reviewer, however, that he does minimize them when he adds: "These divisions within the world community inevitably limit and weaken the substantial content of its laws and make the continued existence of the community itself precarious, but they do not in themselves deprive it of its character of a community with a law derived from and supported by its common will." Or, "The problems which confront the world community, grave as they may be, do not impair its character as a community or the binding nature and potentially reasonably comprehensive ambit of its law" (pp. 95-96).

he can absorb and comprehend the non-legal technical aspects of the problem with which he deals. Had Jenks carefully examined the relationship between world conditions and value maximization he might have discovered that his "common morality" could be made more appealing and ultimately more acceptable[28] if based on realizable universally held aspirations for the good life, coupled with realistic fears of total value destruction, rather than merely being "the product of an enlightened self-interest which does to others as it would be done to primarily because an accepted code of conduct eliminates some of the uncertainty of life and makes it less 'nasty, brutish and short' " (p. 66).[29]

For Carlston, however, the success of organization and law depends upon the degree to which they provide a vehicle for the protection and realization of widely shared values. Unfortunately, in developing his study of nationalization he falls short of the suggested objective by reason of his failure to treat adequately such elements of his subject as investment guarantee insurance, the ability to pay adequate compensation promptly and its economic effect on the developing nation, and the degree of tenacity with which perspectives leading to confiscation are held.[30]

Lastly, *international legal scholars can develop realistic alternatives for decision-makers.* There can be little doubt that harassed political leaders of the major power-wielding states are looking for, but not finding, courses of action which will enable them both to lessen international tensions without sacrificing national interests and to get

[28] Jenks asserts that "we must seek a basis of obligation which will hold effectively the allegiance of mankind" (p. 88) and "a concept which has the simplicity, the authority and the dynamic quality necessary to establish the obligation of international law in the hearts and minds of the people" (p. 89).

[29] The quoted phrase is deemed to be the basis of a "commercial morality" which is similar to "the morality necessary to sustain an effective system of international law" (*ibid.*). While it is no doubt true that the desire for certainty and order plays a large part in the development of universal norms of commercial law, the realizable hope for profit or, in the behaviorist's terms, the maximization postulate is probably the major factor.

[30] Careful examination of these factors might have led to a more realistic conclusion that the norm which uniformly requires "prompt, adequate and effective compensation," as those terms are generally defined by lawyers in developed countries, is not necessarily the norm best designed, in the current state of world conditions, to result in the widest realization of values. Compare Frank G. Dawson and Burns H. Weston, "Banco Nacional de Cuba v. Sabbatino: New Wine in Old Bottles," *University of Chicago Law Review*, XXXI (Autumn 1963), 63; and "Prompt, Adequate and Effective: A Universal Standard of Compensation?" *Fordham Law Review*, XXX (April 1962), 727.

A more comprehensive methodology for exploring difficult legal problems of contemporary importance is applied in McDougal, Lasswell, and Vlasic, *Law and Public Order in Space* (New Haven 1963).

on with the business of economic and cultural development. In large measure, the failure of many of the current proposals to win their approval is attributable to the disorientation of the leaders themselves and those who influence them, as suggested above. This aspect of the problem will not yield to short-term solution; reorientation in perspectives of reality requires a committed elite working over a span of time with every available instrument of communication. In the meantime, however, there are opportunities for scholars to develop specific proposals of varying degrees of modesty for moving toward the goal of minimum order even within the framework of a "reality gap." For such proposals to succeed, they must not irritate the raw nerves of global conflict—the cold war, colonialism, intervention, aggression—nor violate the current taboos of internal politics of the participating states—appeasement, loss of sovereignty, recidivism, etc.[31] On the positive side, they must enhance some recognized value goal shared by the participants—some common interest—no matter how modest. The more effective proposals will fulfill widely shared and frequently articulated desires for rapprochement among cold war rivals, and will have as their objective the restoration of order or the advancement of scientific, technological, cultural, and economic goals. The major gains of the last few years, such as the Antarctic treaty, the nuclear test ban treaty, the mutual, voluntary limitation on the manufacture of nuclear weapons, and the sale of wheat to the USSR by the United States, have all exhibited these characteristics.

It is in the area of techniques for developing such proposals that Jenks's broad experience as an international civil servant in the ILO yields up his most valuable theory. He recommends that in areas where broadly drawn agreements, such as the Draft Conventions on Human Rights, fail to secure wide adherence, a piecemeal approach can be more fruitful. Similarly, with respect to the growth of international organization, he recognizes the practical difficulty of developing the United Nations into a centralized organization along the

[31] It does not matter much if the proposals actually do constitute intervention, in any of the senses in which that term has been used, or do entail a limitation of freedom of action (loss of sovereignty), etc., so long as this is not publicized and exploited to the point where the authoritative decision-maker is forced by political pressures to abandon them. Thus the way in which words, slogans, and symbols are manipulated becomes relevant. For example, chances for ratification by the United States of the consular treaty with the USSR will be improved if it is popularly treated as "a gain for democracy and the open society" rather than as a "strengthening of diplomatic ties between the United States and the Soviet Union." Unfortunately, the latter approach has already been inaugurated by opponents of the treaty. See *New York Times*, June 12, 1964.

lines of familiar national patterns, and recommends instead the decentralization of responsibility for the functions of international government along lines which have already appeared, toward "a new form of functional federalism" (p. 31). And Carlston, though less directly concerned with decentralization, has stated: "The task of establishing a viable international organization, in which authority is exercised as a means of coordinating action to maximize value realization by the members of the organization, is one of establishing a set of conditions in which the members, as actors in the organization, will move fluidly through a sequence of situations in which they accept authority, at first minimally, with slight commitment of time, action, and resources, and low risk of value impairment, and thereafter, in successively larger commitments of time, action, and resources and higher risk of value impairment. Such a set of conditions involves planning a sequence of goals embodying a desired pattern of value realization" (p. 115).

Both, therefore, seem to share a healthy skepticism about the possibility of attaining Utopian schemes of international organization overnight, and both seem to recognize the need for limiting goals to negotiable proportions.[32] Yet techniques alone are not enough, and neither work contains specific proposals for meeting the most immediate needs of the times—the inclusive sharing of force and the prevention of escalation. Other legal scholars, however, have developed such proposals. Professors Falk and Mendlovitz, for example, have recommended "precautionary intervention" by the United Nations to resolve situations of social conflict existing within developing states while such situations are relatively depoliticized and remote from the paralyzing effects of the cold war.[33] If their proposal gains acceptance and proves effective over time, its success will be mainly attributable to the fact that they frankly faced up to the obstacles as well as to the benefits which could be expected.

Finally, to mention an emerging possibility, the recent proposal of the USSR for the establishment of a standing international peacekeeping force through the Security Council of the United Nations[34] may have within it the seeds of an acceptable plan for inclusive shar-

[32] Their views seem to be in general accord with the sophisticated but practical technique of "fractionating conflict," recently developed by Professor Fisher. (Roger Fisher, "Fractionating Conflict," *Daedalus* [Summer 1964], 920.) He proposes that the scope of the issues submitted to international negotiations can be narrowed or broadened in order to enhance the possibility of agreement.

[33] Richard A. Falk and Saul H. Mendlovitz, "Towards a Warless World: One Legal Formula to Achieve Transition," *Yale Law Journal*, LXXIII (January 1964), 399.

[34] See *New York Times*, July 5, 1964, IV; July 7, 1964.

ing of force by all nations to prevent the growing demands of arrant nationalism from disrupting world order. It is suggested that this proposal may be more than a mere propaganda effort and, if so, may have a greater chance for successful implementation than has generally been recognized. While this article cannot serve as the vehicle for lengthy exposition of the reasoning in support of this view, it may be useful to point out that the proposal may be born not only out of dissatisfaction with the Uniting for Peace Resolutions and unwillingness to pay for earlier peace-keeping operations, but also out of a recognition by Soviet leaders that their own ability to manipulate and control global conflict to their own ends has declined substantially in a relative sense vis-à-vis the lesser powers as a result of the paralyzing effect of the balance of deterrent power, and that the danger of uncontrolled and undesired escalation has therefore increased substantially.[35] It is not unreasonable, therefore, to suggest that the Soviet Union may now be prepared to cooperate in the creation of an international force designed to prevent escalation in situations where its influence would otherwise prove ineffective to bring a conflict under control, as in Laos and Vietnam and possibly in Cyprus.[36] That such a force and its operation would be subject to the veto in the Security Council would not seem to undermine its effectiveness if the basic premise—that the use of such a force would serve Soviet policy—has any validity.[37] It will be recalled that cooperation among major states based on mutual interests in preserving peace is what the framers of the United Nations had in mind in 1945.

[35] Cf. Grayson Kirk, "World Perspectives, 1964," *Foreign Affairs,* XLIII (October 1964), 1. Mr. Kirk suggests that, partly as a result of the nuclear "balance of frustration," the relative status of the United States and the USSR in the world has been declining. He takes support for his position from Senator Fulbright's statement in *Old Myths and New Realities* (New York 1964), 54: "By their acquisition of nuclear weapons the two great powers have destroyed the traditional advantages which size and resources had placed at their disposal." Other knowledgeable commentators have also noted this phenomenon. See, e.g., Joseph C. Harsch, "Changing Times at Berlin Wall," *Christian Science Monitor,* September 21, 1964; James Reston, "Saigon and U.S. Power," *New York Times,* August 31, 1964; and Edward Crankshaw, "East and West Enter a New Phase," *New York Times Magazine,* August 30, 1964.

[36] The establishing and financing of a United Nations peace force through the General Assembly, rather than the Security Council, might seem to be a simple solution, but the Soviet Union's recorded opposition, based on legal and political factors, is too well known to permit a reversal in the near future. Furthermore, it is probably true that exercise of the Security Council veto against peace-keeping operations, at least in situations in which the danger of escalation is not serious, will remain an important strategy of the Soviet Union.

[37] Cf. Roger Fisher, "Should We Veto the Troika?" *New Republic,* August 21, 1961, 11-14, reprinted in *Legal and Political Problems of World Order,* ed. by Saul H. Mendlovitz (New York 1962), 276.

It is the irony of this era that the effective decision-makers of the global community maintain the self-destructive perspectives of the lemming while available knowledge and resources bring near-Utopian goals of peace, human welfare, and dignity within reach. Much of the cause can be attributed to a "reality gap" of cosmic proportions. It is an important task of scholars, therefore, to discover and then to describe to all those who participate in decision-making in the global arena the real conditions of the world society and the relationship between these conditions and the values of human dignity. This is essentially a task of communication for the purpose of changing perspectives. It is far from hopeless; history has already proved that perspectives held by entire societies can be changed almost overnight, and the instruments of global communication have never been more effective than they are today.

Then, building upon a foundation of reality, legal scholars can develop programs, plans, and proposals which offer alternatives for decision-makers that not only promote the values of human dignity, but are tailored for acceptance under existing conditions. Most immediately, the need is for specific proposals to bring the alarming recent development of lesser-power irrationality, conflict, and resort to coercion within a system of international authority and effective control.

The needs and possibilities of order and international organization to promote the advancement of human welfare on a global scale are perceived by both Carlston and Jenks. They do not suffer from the paralysis of parochialism or the pessimism of myopia. The merit of Jenks's work lies in its persuasiveness in urging international lawyers to enlist in the cause of an international law for human welfare and freedom and in its observations drawn from a rich experience. Its failures are the consequence of the tendency, perhaps natural in a lawyer steeped in the tradition of the common law, to elevate the importance of doctrine over the search for agreement on underlying policies. Kenneth Carlston, on the other hand, has given us a carefully drawn view of the role of law in world society which furnishes more than a little light in the search for global institutions to serve human dignity.